Single Bench

IN THE HIGH COURT OF JUDICATURE AT BILASPUR

CHHATTISGARH

Cr. Appeal No. 127 Of 2005

APPELLANT : Sanjay Pathak S/o Late Shri Ramnarayan, aged about 36-37 years resident of Village Bakhrupara, Narayanpur District Bastar (CG).

4685/05 IN JAIL

16/12/05

By Shri Gajendra Sahu

VERSUS

RESPONDENT : State of Chhattisgarh, Through The Station House officer, Police Station Narayanpur District Bastar (CG).

APPEAL UNDER SECTION 374(2) OF CODE OF CRIMINAL PROCEDURE

CONVICTION

F.R.

HIGH COURT OF CHHATTISGARH AT BILASPUR

Cri. Appeal No. 927/2005

Sanjay Pathak

Versus

State of Chhattisgarh

Post for Order: 22.02.2006

Sd/-
Dilip Raosaheb Deshmukh
Judge

A.F.R.

HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr. Appeal No.927/2005

Single Bench: Hon'ble Shri **Dilip Raosaheb Deshmukh, J.**

Sanjay Pathak

Versus

State of Chhattisgarh

Shri S.C.Verma, Advocate with Shri Shailendra Dubey, Counsel for the appellant.

Shri Somesh Bajaj, Dy.Govt. Advocate for the State.

JUDGMENT

(Delivered on 22nd February 2006)

This appeal is directed against the judgment dated 16.11.2005 delivered by Shri M.P.Singhal, Special Judge, Scheduled Caste & Scheduled Tribe (Prevention of Atrocities) Act, Bastar, place at Jagdalpur in Sessions Case No.164/2005 whereby the appellant was convicted under Section 376(2)(g) & 323 read with Section 34 of I.P.C. and was sentenced to undergo R.I. for 10 years and a fine of Rs.5000/-, in default to under additional R.I. for six months under Section 376(2)(g) of the I.P.C. and to undergo R.I. for six months under Section 323 read with Section 34 of the I.P.C. Both the sentences were directed to run concurrently.

2. Briefly stated the prosecution story is that prosecutrix, a girl aged 19 - 20 years, and Dogaram P.W.2 had visited the fair in Borpal to see the dance. While they were witnessing the dance, some policemen passed by. After some time, the appellant Sanjay Pathak

with two other co-accused came and told the prosecutrix that she was being called by the police. The prosecutrix and Dogaram refused to obey. The appellant and the two persons accompanying him assaulted Dogaram and the prosecutrix by a wooden club. The appellant caught hold of the neck of the prosecutrix and threatened whereupon the prosecutrix and Dogaram accompanied the appellant and his two associates. The appellant took the prosecutrix towards the village pond. While the two associates caught hold of Dogaram, the appellant took the prosecutrix in a field and committed rape on her. The prosecutrix shouted but the appellant gagged her mouth with one hand. Thereafter, the two associates of the appellant also committed rape on the prosecutrix one after another. The prosecutrix shouted but no one came to her to rescue.

3, F.I.R. Ex.P.6 was lodged by the prosecutrix in police Station Narayanpur. situated 2 kilometers away from the place of occurrence at 9.00 A.M wherein she mentioned that she knew the appellant by name since he was a bus conductor. It was also mentioned in the F.I.R. that the appellant had removed Rs.3,00/- from the blouse of the prosecutrix.

4. The appellant was arrested on 4.3.2005 at 3.00 P.M. by Police Station Narayanpur. Shri M.R.Ahire, S.D.O. Police P.W.6 seized on 3.3.2005 from the place of occurrence one black sandal, one locket and broken bangles vide Ex.P.2. The prosecutrix was sent for medical examination. Dr. Kumud Kanwar P.W.4 examined the prosecutrix at 3.45 P.M. on 3.3.2005 and found that secondary external genital was well developed. There was no sign of struggle. There was an old ruptured hymen, two fingers were easily admitted in the introitus. In the opinion of the Dr. Kumund Kanwar P.W.4, the prosecutrix was habituated of sexual intercourse. She opined that there was no sign

of struggle or any external injury on her person or on her back. She prepared slides of vaginal secretions and after sealing the slides handed it over to the Constable. Shri M.R.Ahire, P.W.6 seized the petticoat of the prosecutrix and the sealed vaginal slides on 4.3.2005 vide Ex.P.4. The appellant was medically examined on 5.3.2005 by Dr. M.K.Suryawanshi who opined that the appellant is capable of performing sexual intercourse. The petticoat and slides mentioned above were sent for Forensic Science Laboratory. Vide report Ex.P.9 presence of human spermatozoa was confirmed on the petticoat as well as two vaginal slides. The two associates of the appellant could not be arrested. After completion of investigation, the appellant was prosecuted under Section 376(2)(g), 323 read with Section 34 and Section 392 of the I.P.C. Charge for aforesaid offences was framed against the appellant. The appellant abjured the guilt. The prosecution examined Dr. M.K.Suryawanshi P.W.1 who had examined appellant, the prosecutrix P.W.2, Dogaram P.W.3, Dr. Kumud Kanwar P.W.4, S.H.O. Narayanpur Sanjay Pudhir P.W.5 and S.D.O. Police M.R.Ahire P.W.6. Relying upon the evidence led by the prosecution, the trial judge convicted and sentenced the appellant as aforesaid in para 1.

5. Shri S.C.Verma, learned counsel for the appellant has argued that the evidence of the prosecutrix P.W.2 and the Dogaram P.W.3 is highly contradictory and does not inspire confidence. He has also argued that the evidence of Dr. Kumud Kanwar P.W.4 completely negatives the story of gang rape on the prosecutrix. It was also contended that although the appellant was named in the F.I.R., yet the prosecutrix admitted that she had seen the appellant for the first time on the date of occurrence and did not know his name. She also admitted that since the police had brought the accused from the fair

and told her that he was the person involved in the rape, she also told the police likewise. The testimony of Dogaram in para 6 was referred to in details while contending that it completely renders the testimony of the prosecutrix unreliable. The learned counsel for the appellant placed reliance on *Devinder Singh and others v. State of Himachal Pradesh* reported in **A.I.R.2003 S.C. 3365**, *Dilip and another v. State of M.P.* reported in **A.I.R.2001 S.C. 3049**, *State of Maharashtra v. Abdul Hafiz Faroki and others* reported in **A.I.R.1998 S.C. 2382** and *State of Karnataka v. Mapilla P.P.Soopi* reported in **A.I.R.2004 SC 85** in support of the aforesaid contentions and prayed that the appellant be acquitted. On the other hand, Shri Somesh Bajaj, learned Dy.G.A. argued in support of the impugned judgment and contended that while no reason whatsoever for false implication of the appellant emerged from the testimony of the prosecutrix, it stood the test of cross-examination and was wholly reliable. It was also contended that mere fact of absence of any external or internal injuries on the prosecutrix was not sufficient to disbelieve her testimony which was otherwise reliable.

6. Having heard rival contentions, I have gone through the record. The law is well settled that the prosecutrix in a sexual offence is not an accomplice and there is no rule of law that her testimony cannot be acted upon and made basis of the conviction unless corroborated on material particulars. The only point which therefore requires consideration in this appeal is whether the testimony of the prosecutrix P.W.2 is reliable and conviction for an offence of gang rape can be based on the testimony of the prosecutrix, though not corroborated by medical evidence.

7. The first information report lodged by the prosecutrix was proved by S.H.O. P.S. Narayanpur Sanjay Pudhir P.W.5. F.I.R. Ex.P.6

clearly shows that the prosecutrix had mentioned therein that since the appellant was a bus conductor, she knew him by name. However, in cross-examination para 6, she stated that she had seen the appellant for the first time on the date of occurrence and did not know his name. She also denied having lodged a named F.I.R. against the appellant and said that even on the date of her evidence she did not know the appellant by his name.

In F.I.R. Ex.P.6 as well as in her evidence, the prosecutrix had mentioned that the appellant had assaulted the prosecutrix and Dogaram P.W.3 by a club. However, no external injuries were found on the prosecutrix by Dr. Kumud Kanwar P.W.4.

8. The prosecutrix stated in para 7 that the police had apprehended the accused from the fair and produced before her for identification whereas Dogaram P.W.3 stated in para 5 that after the incident the police had gone to the house of the appellant, who was found sleeping. He denied that the accused was apprehended in the fair and asserted that the accused was sleeping in his house. He also stated that after the incident he had told the prosecutrix that the name of the appellant was Sanjay Pathak. However, this is not corroborated by the prosecutrix.

9. The prosecutrix has stated in para 2 that the accused and his two associates dragged her and Dogaram towards the field and while the two associates held Dogaram, the accused-appellant committed rape on her. She further stated that the two associates of the accused thereafter committed rape on her one by one. In cross-examination, the prosecutrix has admitted that neither she shouted during the sexual assault on her nor did she make any effort to scratch or bite the accused-appellant or his associates during the sexual assault. This testimony of the prosecutrix is contradicted by

the first information report Ex.P.6 in which the prosecutrix had mentioned that she had raised lot of hue and cry during the incident.

10. The prosecutrix has in para 9 stated that while committing rape, the appellant had opened the buttons of her blouse and had lifted the petticoat towards her head whereas Dogaram P.W.3 has in para 6 stated that the appellant had made the prosecutrix completely naked before committing rape on her. The prosecutrix has not made any such statement that she had sustained any injury during the rape committed by the appellant and his two associates on her one after another. However, Dogaram P.W.3 has stated that the appellant had pushed the prosecutrix on the ground and due to the gang rape the prosecutrix had sustained injury on her back, hips, feet etc. and blood was oozing out of these wounds. This testimony is also sharply contradicted by Dr.Kumud Kanwar P.W.4 who had examined the prosecutrix on the same day. She deposed that no marks of any injury or struggle were found on the body or private parts of the prosecutrix. In cross-examination also she stated that there was no reddishness or swelling on the private parts. In her opinion, the prosecutrix had not been subjected to sexual intercourse. In the F.I.R. Ex.P.6 it had been stated that the appellant and his two associates had assaulted Dogaram also with a wooden club. Dogaram has also stated in para 8 that he had sustained injury on his back. However, Dogaram was not sent for medical examination by the police.

11. The prosecutrix admitted in para 13 that she was unmarried and had sexual relationship with Dogaram P.W.3. This fact is also admitted by Dogaram in para 9 of his testimony. The defence of the accused was that in the greed of getting compensation from the State Government in a case of rape with a tribal lady, a false F.I.R. was lodged.

12. The trial Court has primarily relied upon the testimony of the prosecutrix ignoring the serious contradiction mentioned above to convict the appellant. It was strenuously urged by the learned counsel for the appellant that the trial Court has gravely erred in not noticing the serious contradictions appearing in the testimony of the prosecutrix P.W.2 and Dogaram P.W.3 and the medical evidence of Dr. Kumud Kanwar P.W.4 which rendered the prosecution story completely unreliable and incredible. Upon a careful perusal of the evidence on record, as noticed earlier, the medical evidence does not support the case of the prosecution that the prosecutrix was raped by three young persons against her will after removing her clothes and pushing her on the field. In her testimony, the prosecutrix denied having named the appellant in the F.I.R.. The absence of any external or internal injuries on her person creates a serious doubt on her truthfulness. The possibility that she had mentioned the name of the appellant in the F.I.R. Ex.P.6 at the behest of Dogaram P.W.3 cannot be ruled out. No reason whatsoever has been assigned by the Investigating Officer as to why the two associates of the appellant could not be apprehended or why Dogaram was not medically examined. No policeman was examined to substantiate the testimony of the prosecutrix that while they were watching the dance, the police had arrived and asked her and Dogaram as to what were they doing.

13. In view of the aforesaid contradictions, the testimony of the prosecutrix, being sharply contradicted not only by Dogaram but also by medical evidence, fails to inspire confidence. It cannot be ruled out that if gang rape was committed on the prosecutrix by the appellant and his two associates one after another in the field after removing clothes, some injuries on the back of the prosecutrix would

have certainly been found. It is difficult to believe that Dogaram P.W.3, a young man of 25 - 26 years did not raise any hue and cry and also did not make any effort to rescue the prosecutrix or to free himself from the two unknown associates of the appellant.

14. Although the prosecutrix has stated that a crowd had gathered to witness the dance in the fair, yet none of the persons present there have been examined by the prosecution to substantiate the testimony of the prosecutrix and Dogaram P.W.3 that the appellant had forcibly taken them from the fair on the pretext of having been called by the police. Although the prosecutrix had in para 1 admitted that Malti, Lakhmi and Bajjo had accompanied her to the fair, yet she stated in the next breadth that while she and Dogaram P.W.3 were witnessing the dance, these three witnesses were not with them. None of the above mentioned persons, though cited by the prosecution, were examined.

15. In the light of the abovementioned serious contradictions, the testimony of the prosecutrix is rendered unworthy of credit. It is difficult to accept the truthfulness of the version of the prosecutrix that any sexual assault was committed on her by the appellants and his two associates since her narration of the incident becomes basically infirm on account of being contradicted by the statement of Dogaram P.W.3 and Dr. Kumud Kanwar P.W.4.

16. For the reasons aforesaid, I am of the considered view that the testimony of the prosecutrix about gang rape having been committed on her by the appellant and the assault by the appellant with a club does not inspire confidence. So far as the report of the F.S.L. about the presence of human spermatozoa on the vaginal slides and petticoat of the prosecutrix is concerned, it cannot be used as a circumstance to convict the appellant under Section 376(2)(g) since the prosecutrix

had admitted of sexual relationship with Dogaram. Therefore, the report of the F.S.L. did not by itself establish the guilt of the appellant under Section 376(2)(g) beyond doubt. For the aforesaid reasons, the appellant is, in my considered opinion, entitled to benefit of doubt.

17. In the result, this appeal is allowed and the conviction of the appellant under Section 376(2)(g) and 323 read with Section 34 of the I.P.C. and the sentence awarded thereunder are set aside. The appellant is acquitted and shall be set at liberty forthwith, if not required in any other case. Fine, if paid, shall be refunded to the appellant.

Sd/-
Dilip Raosaheb Deshmukh
Judge

Anjani